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September 23, 2002

VIA ELECTRONIC MAIL AND FACSIMILE

Mr. James L. Connaughton
Chairman, Council on Environmental Quality
NEPA Task Force
P.O. Box 221150
Salt Lake City, UT 84122

RE: Comments on Proposed NEPA Task Force Activities

Dear Mr. Connaughton:

On behalf of the Forest County Potawatomi Community ("FCPC"), we are submitting the following comments on the proposed nature and scope of NEPA Task Force activities identified in the July 9, 2002 Federal Register notice (the "Notice"). 67 Fed. Reg. 45510-45512.

The FCPC is a federally recognized Indian Tribe located primarily in northeastern Wisconsin. The FCPC relies on the natural environment not only for subsistence purposes, but to provide resources and places essential to sustain cultural traditions, ceremonial life and religious practices. Thus, for the FCPC, impacts to the environment are often also impacts to cultural resources, compounding the severity of their effect. These factors make the protection of the environment from future threats of great importance to the FCPC.

Because of FCPC's unique and close relationship with the environment, issues concerning how the environment may be impacted by federal and/or state actions are of great importance to the FCPC. Accordingly, the FCPC has a significant interest in how the National Environmental Policy Act ("NEPA") is interpreted and applied to proposed federal actions. While the FCPC understands the Council on Environmental Quality's ("CEQ") desire to "improve and modernize NEPA analyses and documentation," the FCPC has the following serious concerns regarding the NEPA Task Force proposals.

A. Any proposed change in Federal agencies' implementation of NEPA would require notice and comment rulemaking before they could be adopted. Notwithstanding the possibility that the adaptive environmental management approach (as discussed below) as well as other proposals in this Notice would likely violate NEPA, any fundamental changes in how agencies implement NEPA can not be adopted without formal notice and comment rulemaking. The need for formal rulemaking extends not only to regulatory changes, as recognized in the Notice, but also to interpretive guidance that would alter the way NEPA is implemented. See, e.g., Appalachian Power Company v. EPA, 208 F.3d 1015 (D.C. Cir. 2000) (setting aside EPA's

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interpretive guidance because it was not promulgated with notice and comment rulemaking procedures); General Electric v. EPA, 290 F.3d 377 (D.C. Cir. 2002) (same). Thus, no provision set forth in study areas A through F can be adopted by the CEQ without formal notice and comment rulemaking procedures. FCPC reserves the right to comment further on such provisions if and when the above rulemaking procedures are instituted.

B. The FCPC has concerns over the provisions in study area A, Technology, Information Management, and Information Security, regarding the protection of sensitive and confidential information provided to federal agencies. A primary information management and security concern for many Indian tribes is the protection of confidential and sensitive information regarding tribal cultural resources when providing federal agencies access to this information in the NEPA processes.[1] Tribal decision-making on what information may be provided often turns on the effectiveness of confidentiality protections for such information. This is so because revealing this information has too often resulted in the abuse and exploitation of tribes' cultural and historic resources. As these resources are inextricably linked to tribes' cultural traditions, religious beliefs and practices, medicines, and identity as distinct communities, tribes are understandably very cautious about divulging this information to outside entities. Thus, tribes must be certain that when information technology is used in agency communications and planning, there are adequate technological protections to ensure the confidentiality of the information provided.

In this regard, Congress, the Advisory Council on Historic Preservation ("Advisory Council"), and numerous federal agencies have all recognized the need to protect sensitive information and have provided mechanisms to ensure the confidentiality of sensitive information. Towards this end, the National Historic Preservation Act ("NHPA") protects the confidentiality of and limits access to information concerning historic and cultural resources that participants reveal as a part of the NHPA consultation process. 16 U.S.C. § 470w-3(a).

The Advisory Council regulations contain specific confidentiality protections for information revealed to federal agencies as a part of NHPA's Section 106 process. While federal agencies are generally required to divulge any information to the public about an undertaking and its effects on historic properties, 36 C.F.R. § 800.2(d)(2), this requirement is subject to one exception: the Secretary is not required to reveal information to "protect confidentiality concerns of affected parties." Id.[2] The Advisory Council regulations further provide that tribes

[1] NEPA's regulations provide that an Environmental Impact Statement must include a discussion and evaluation of the impacts on historic and cultural resources. 40 C.F.R. § 1502.16(g); 40 C.F.R. § 1508.8 (b); 40 C.F.R. § 1508.27(b)(8).

[2] The Advisory Council regulations contain numerous other provisions requiring consideration of confidentiality concerns. E.g., 36 C.F.R. § 800.4(a)(4) (acknowledging that tribes may be reluctant to divulge information about historic properties in consultation and stating that the

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may enter agreements with federal agency officials to "specif[y] how [agencies] . . . will carry out responsibilities" under NHPA and the Advisory Council regulations, "including concerns over the confidentiality of information." Id. § 800.2(c)(2)(ii)(E) (emphasis added).

Thus, when "utilizing information management technologies to enhance the effectiveness and efficiency of the NEPA process," federal agencies must ensure that such technologies provide adequate protections for sensitive information concerning tribal cultural and historic resources as such information is protected from disclosure by federal law.

C. The FCPC has concerns regarding study area B, Federal and Inter-governmental Collaboration, concerning federal agencies' obligations to consult with Indian tribes under the federal trust responsibility. As explained in greater detail in Part D.5 below, the federal trust responsibility imposes fiduciary obligations on the United States to protect the rights, resources and interests of Indian tribes. As is particularly relevant here, the federal trust responsibility imposes legal obligations on the United States to consult with Indian tribes on all proposed federal actions that may affect tribes' interests in a manner that ensures federal consideration of tribes' concerns and objections with regard to such actions. As such, any collaboration in developing environmental analyses or participation in the NEPA process must include adequate consultation with Indian tribes independent of any joint-lead or cooperating agency status.

In brief, the federal trust responsibility is a separate legal doctrine which exists independent of and in addition to specific legal obligations imposed by treaty, statutes, regulations and Executive Orders. See Kagama v. United States, 118 U.S. 375, 383-84 (1886) (relying on the government's fiduciary relationship to the Indians, Supreme Court sustained the constitutionality of the Major Crimes Act, 23 Stat. 385 (1885), 18 U.S.C. § 1153, holding that "these Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . From their very weakness and helplessness . . . there arises the duty of protection and with it the power"); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972) (where no specific statute or treaty was violated, court found that agency officials had violated the trust responsibility). Thus, these obligations function as independent restraints on all federal actions that may affect Indian tribes. See Parravano v. Babbitt, 70 F.3d 539, 546 (9th Cir. 1995) ("[t]his trust responsibility extends not just to the Interior Department, but attaches to the federal

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agency should address confidentiality concerns pursuant to § 800.11(c), infra); id. § 800.4(b)(1) (agency officials should take account of confidentiality concerns when identifying historic properties); id. § 800.5 (when finding no adverse effect, an agency official must provide information on request to the public consistent with confidentiality concerns); id. § 800.6(a)(4) (when finding an adverse effect, an agency official must continue consultation and provide information to public -- consistent with confidentiality concerns); id. § 800.11(c) (requiring agencies to withhold information pursuant to Section 304 and to consult with the Advisory Council in making such determinations).

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government as a whole") (citations omitted) (emphasis added); Northwest Sea Farms Inc. v. United States Army Corps of Engineers, 931 F. Supp. 1515, 1519-20 (W.D. Wash. 1996) (finding that the trust responsibility imposes "a fiduciary duty" with respect to "'any Federal government action' which relates to Indian Tribes") (quoting Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir. 1981)).

The trust responsibility includes the duty to consult with tribes and Indians to ensure their understanding of federal actions that may affect their rights and to ensure federal consideration of their concerns and objections with regard to such actions. As the Court explained in Klamath Tribes v. United States Forest Service, 1996 WL 924509 (D.Or. 1996), "[i]n practical terms, a procedural duty has arisen from the trust responsibility such that the federal government must consult with an Indian Tribe in the decision-making process to avoid adverse effects on treaty resources." Id. at 8. These principles are well settled. E.g., Morton v. Ruiz, 415 U.S. 199, 236 (1974) (denial of general assistance benefits to Indians living near the reservation held to be "inconsistent with the 'distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'"). Id. at 236 (quoting Seminole Nation v. United States, 316 U.S. 286, 296 (1942)); HRI, Inc. v. EPA, 198 F.3d 1224, 1245 (10th Cir. 2000) ("in some contexts the fiduciary obligations of the United States mandate that special regard be given to the procedural rights of Indians by federal administrative agencies") (quoting Felix S. Cohen's Handbook of Federal Indian Law 225 (1982)); Loudner v. United States, 108 F.3d 896, 903 (8th Cir. 1997) (a tribe's lineal descendants were not time-barred from claiming a share of a 1972 distribution of an Indian Claims Commission judgment because "the distribution scheme adopted by the Secretary was contrary to his common-law trust obligations and that the deadline cannot serve to bar plaintiffs' claims to the fund") (emphasis added); Midwater Trawlers Cooperative v. U.S. Dep't of Commerce, 139 F. Supp. 2d 1136, 1145-46 (W.D. Wash. 2000) (consultation grounded in the trust relationship), aff'd in part and rev'd in part, 282 F.3d 710 (9th Cir. 2002); Bedoni v. Navajo-Hopi Indian Relocation Comm'n, 878 F.2d 1119, 1126 (9th Cir. 1989) (Navajo-Hopi Relocation Commission has a trust responsibility to provide correct advice to applicants).

Thus, the federal trust responsibility imposes a legal obligation to consult with Indian tribes on all proposed federal actions that may affect tribes' interests independent of any joint-lead and cooperating agency status. See Notice § B.3, at 45511.

D. The FCPC has significant concerns regarding study area D, Adaptive Management/Monitoring and Evaluation Plans. This study area describes an "adaptive environmental management approach" which would "allow[ ] for approval of an action with uncertain outcomes by establishing performance-based environmental parameters or outcomes and monitoring to ensure that they are achieved." 67 Fed. Reg. at 45512. The description of this approach further provides that "[w]hen those parameters or outcomes are not met, corrective changes would be triggered, for instance to ensure that significant environmental degradation

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does not occur." Id. The FCPC believes that such an approach defeats the very purpose of NEPA and would allow too much leeway for a federal decisionmaker to approve a project without fully understanding the project's likely environmental consequences.

1. The adaptive environmental management approach would violate NEPA's mandate to identify environmental impacts and effects. As the CEQ is well aware, NEPA requires, among other things, a detailed statement on "(i) the environmental impact of the proposed actions, [and] (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented." 42 U.S.C. §4332(C)(i) and (ii). Clearly, one of the fundamental purposes of NEPA is to provide the federal decisionmaker with sufficient information regarding the possible environmental consequences of an action so that the decisionmaker can make an informed and reasoned decision on the proposed action. The adaptive environmental management approach outlined in the Notice would allow federal agencies to ignore these strict NEPA requirements by simply stating that the environmental impacts and effects are "uncertain." Thus, the approach outlined in the Notice violates the fundamental purpose of NEPA and would allow an agency to avoid its duty to take a "hard look" at the environmental consequences of its action. See, e.g., Maryland-National Capital Park & Planning Commission v. U.S. Postal Service, 487 F.2d 1029 (D.C. Cir. 1973) (finding that a reviewing court must consider whether the agency took "a 'hard look' at the problems as opposed to bald conclusions, unaided by preliminary investigation").

2. The adaptive environmental management approach is inconsistent with CEQ's implementing regulations. CEQ regulations implementing NEPA are very clear that federal agencies are required to "identify environmental effects and values in adequate detail." 40 C.F.R. §1501.2(b). These regulations state that the purpose of an Environmental Impact Statement is to "provide full and fair discussion of significant environmental impacts." 40 C.F.R. §1502.1. Similarly, the regulations require federal agencies to "avoid or minimize any possible adverse effects of their actions upon the quality of the human environment." 40 C.F.R. §1500.2(f). It is clear that an agency could not "avoid or minimize any possible adverse effects," if it did not first understand what those effects might be. Thus, it is clear that allowing federal agencies to simply state that a project would have uncertain outcomes and should be approved albeit with certain monitoring and corrective action requirements totally ignores the basic underpinning of NEPA -- to understand the possible consequences of a project before federal action is taken.

3. The adaptive environmental management approach is not necessary because the CEQ regulations already provide a method for evaluating uncertain outcomes.

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The CEQ regulations already provide a procedure whereby uncertain outcomes can be evaluated. See, 40 C.F.R. §1502.22. These procedures provide that if the information necessary to evaluate the uncertain outcome is reasonably available, the agency must include the information in the EIS. See, 40 C.F.R. §1502.22(a). The procedures also provide that where such information cannot be readily obtained, the agency must evaluate possible outcomes based upon theoretical approaches or generally accepted scientific methods. See, 40 C.F.R. §1502.22(b). Thus, the proposed adaptive environmental management approach would undermine the already existing procedures to address uncertain outcomes.

4. The significant practical difficulties in implementing the adaptive environmental management approach militates against its adoption. The adaptive environmental management approach would essentially allow federal agencies to permit projects without first understanding the environmental consequences of such permitting. In exchange for the agency's failure to do a proper and adequate environmental analysis before the project is permitted, the project sponsor would be required to implement some type of monitoring program in an attempt to gauge the level of environmental impairment that actually results from the project. There are numerous practical difficulties with such an approach including:

(a) Adequate monitoring systems may not exist that are capable of detecting all environmental impacts.

(b) Even if adequate monitoring systems are available they likely would not detect an impact until and unless the impact had already occurred. In other words, if you are able to detect and monitor an impact, it will likely be too late to avoid the impact in the first place.

(c) Corrective actions may be inadequate to restore the environment once the impact has been detected by monitoring. This difficulty is particularly troublesome where the resources that are impacted cannot be restored by conventional methods.

(d) This approach shifts the burden of demonstrating the environmental outcomes of an action from the project sponsor to the regulatory agency. In the existing NEPA system, an applicant or project sponsor typically must demonstrate that the proposed project will not have significant adverse environmental consequences. However, under the proposed approach, the burden of demonstrating environmental impacts will shift to the regulatory agency.

(e) It is unclear how, or if, the monitoring requirements and corrective changes would be enforceable after a project is authorized.

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(f) There are likely numerous practical and economic difficulties that would be encountered if a fully implemented project were forced to shut down, dismantle or significantly alter the way it operates once uncertain environmental outcomes are later determined to have adverse impacts.

(g) It is unlikely that monitoring requirements and/or corrective changes could be enforced and implemented after a project has completed its useful life. This is especially problematic where uncertain outcomes may not manifest themselves until many years after the project has shut down and the project sponsor is no longer a viable entity to implement such requirements.

5. The adaptive management approach is inconsistent with federal agencies' trust responsibility to protect tribal rights and resources. The federal trust responsibility imposes fiduciary duties on federal agencies to protect the rights, resources and interests of Indian tribes. This duty requires that the United States protect the interests of tribes as a guardian would those of his or her ward, Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831), guaranteeing the protection of tribes' federal rights. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557-62 (1832). Under the trust responsibility, federal agencies have a "responsibility to protect [tribes'] rights and resources," Klamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206, 1213 (9th Cir. 1999), and must satisfy "'obligations of the highest responsibility and trust,'" Muckleshoot Indian Tribe v. Hall, 698 F. Supp. 1504, 1510-11 (W.D. Wash. 1988) (quoting Seminole Nation v. United States, 316 U.S. 286, 297 (1942)).

The trust responsibility further protects tribes' rights to natural resources needed for subsistence, traditional, ceremonial, religious and other purposes. These rights include on and off reservation harvesting rights, see Menominee Tribe v. United States, 391 U.S. 404, 405-06 (1968), rights to protect the reservation environment from off-reservation impacts, Wisconsin v. EPA, 266 F.3d 741 (7th Cir. 2001), cert. denied, 122 S. Ct. 2347 (June 3, 2002), and water rights, Winters v. United States, 207 U.S. 564 (1908), among others. The trust responsibility also protects tribal cultural resources, as Congress has expressly recognized. Native American Graves and Repatriation Act, 25 U.S.C. § 3010; Native American Languages Act, 25 U.S.C. § 2901(1). Congress has also enacted numerous statutes requiring the protection of tribal cultural resources, including for example, the National Historic Preservation Act, 16 U.S.C. §§ 470-470x-6, which obligates federal agencies to assess the impact of federal undertakings on properties of traditional cultural and religious importance to tribes, including properties located on private lands off-reservation, and to seek to avoid any adverse impacts on such resources.

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The federal trust responsibility further imposes a duty to mitigate any impacts to tribal rights and resources. This duty arises from the standard of care applicable to federal agencies' conduct as trustee (discussed above), and the agencies' obligation to ensure that tribes' rights are protected to the fullest extent possible. Northwest Sea Farms, 931 F. Supp. at 1520; Klamath Tribes v. United States, 1996 WL 924509, at 8 (D. Or. 1996); see also Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032, 1033 (9th Cir. 1985); United States v. Washington, 759 F.2d 1353, 1359-60 (9th Cir. 1985).

As the adaptive management approach would allow federal agencies to approve projects for which there were "uncertain outcomes," federal agencies applying this approach could not ensure that they were meeting their "responsibility to protect [tribes'] rights and resources," or satisfy their "'obligations of the highest responsibility and trust.'" This is so because the process of approving a project with uncertain outcomes may not require that the agency determine what impacts will occur on tribal interests, how such impacts may be mitigated, or whether such impacts can be approved at all. Thus, the adaptive management approach is inconsistent with the federal trust responsibility owed to tribes and would allow federal agencies to avoid their duties to protect tribal rights and resources.

6. The adaptive management approach threatens Indian tribes' continued reliance on the natural environment for their cultural traditions, ceremonial life and religious practices. The adaptive management approach would allow federal agencies to approve projects for which the impacts are unknown. If adverse impacts were to occur, Indian tribes would face not only the loss of subsistence resources, but also the loss of resources and places essential to sustain cultural traditions, ceremonial life and religious practices. Often, these cultural and religious resources are unique in their geography, history and cultural significance. Once these cultural resources are adversely impacted or lost, such impacts cannot be reversed as the resources are unique and irreplaceable. Thus, no "corrective changes" under the adaptive management approach are likely to remedy the degradation or loss of these cultural sites or resources once the impact has already occurred.

The FCPC appreciates the opportunity to comment on the proposed activities of the NEPA Task Force. In light of the comments and concerns presented above, the FCPC believes that the NEPA Task Force should recommend procedures to ensure the protection of sensitive and confidential information provided to federal agencies. The FCPC also believes that the NEPA Task Force should clarify federal agencies' obligation to consult with Indian tribes on all proposed federal actions that may affect the tribes' interest.

Furthermore, the FCPC believes that the NEPA Task Force should seriously reconsider the proposed adaptive environmental management approach. Such an approach is unnecessary,

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inconsistent with current NEPA implementation procedures and in direct conflict with the fundamental principles of NEPA. In addition, the approach is inconsistent with federal agencies' trust responsibility and threatens Indian tribes' continued reliance on the natural environment. Lastly, the FCPC would like to point out that any changes in the way federal agencies implement NEPA must be adopted through formal notice and comment rulemaking procedures.

If you have any questions regarding these comments or would like to discuss FCPC's concerns in greater detail, please contact either of the undersigned at your convenience.

Very truly yours,

GODFREY & KAHN, S.C.

John L. Clancy

Very truly yours,

SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY

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FAX COVER SHEET

DATE: September 23, 2002 **PAGES (INCLUDING COVER): 10**

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COMPANY: NEPA Task Force

CLIENT NUMBER: 053026-0019

FROM: John L. Clancy, Ext. 5256

MESSAGE:

IF YOU HAVE A PROBLEM RECEIVING THIS TRANSMISSION, PLEASE CALL JEAN POWER AS SOON AS POSSIBLE AT 414-273-3500.

Sent By: DM